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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

ZACKARIAH WILLIAM BORYNACK,

Defendant and Respondent.

E065549

(Super.Ct.No. BAF1100559)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Reversed with directions.

Michael A. Hestrin, District Attorney, and Donald W. Ostertag, Deputy District Attorney, for Plaintiff and Appellant.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Respondent.

This is an appeal following a resentencing hearing ordered by this court. On November 22, 2013, defendant and respondent Zackariah William Borynack pled guilty to several counts involving possession of explosive devices and materials, armor-piercing

incendiary projectiles, training practice tracer rounds, and high explosive incendiary rounds. On June 27, 2014, the trial court sentenced him to two years for possession of a destructive device (Pen. Code,<sup>1</sup> § 18715, subd. (a)) and concurrent two-year terms on all remaining counts. After applying defendant's 117 days of custody credits, the court suspended execution of the entire remaining sentence and placed him on mandatory supervision pursuant to section 1170, subdivision (h)(5). The People appealed, contending section 18780 prohibited such action. We agreed and remanded the matter for resentencing. (See *People v. Borynack* (2015) 238 Cal.App.4th 958 (*Borynack*).)<sup>2</sup>

On January 12, 2016, the trial court resentenced defendant to a total term of two years and, over the People's objection, granted defendant 699 days of credit for his time spent on mandatory supervision. The People appeal, contending the court was not permitted to award custody credits for its previously imposed unauthorized sentence. We agree.

## I. RELEVANT PROCEEDINGS

At defendant's January 12, 2016, resentencing hearing, the trial court acknowledged this court's ruling that placing defendant on mandatory supervision had been an unauthorized sentence; however, it found that he should be entitled to custody credit for that time. The court found the issue to be one of first impression. The People objected to defendant receiving credit for time spent on mandatory supervision, arguing

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> By this court's order of June 7, 2016, judicial notice was taken of the record in case No. E061733 and included in the record of this case.

that the trial court was required to sentence defendant to two years in jail with credit for time actually in custody (71 days actual and 70 days under section 4019, for a total of 141 days). (§§ 1170, subd. (h), 18715, subd. (b).) The trial court rejected the People's argument and credited defendant with the time he spent on mandatory supervision. Thus, the court sentenced defendant to two years in prison, with credit for the 558 days, plus 141 days presentence credits. Defendant was remanded to serve 32 days in jail.

## II. CUSTODY CREDITS MAY NOT BE AWARDED FOR TIME SPENT OUT OF CUSTODY ON MANDATORY SUPERVISION

Defendant was convicted of committing a number of offenses proscribed under the destructive devices and explosives chapter of the Penal Code (§ 18710 et seq.) which expressly prohibits a trial court from suspending execution of a sentence. (§ 18780 ["A person convicted of a violation of this chapter shall not be granted probation, and the execution of the sentence imposed upon that person shall not be suspended by the court."].) Thus, in People's first appeal in this case, we reversed the trial court's unauthorized grant of mandatory supervision and remanded for resentencing. (*People v. Borynack*, *supra*, 238 Cal.App.4th at pp. 965-966.) On remand, the trial court, relying on *People v. Tanner* (1979) 24 Cal.3d 514 (*Tanner*), *People v. Holt* (1985) 163 Cal.App.3d 727 (*Holt*), and the difference between probation and mandatory supervision, reasoned that it never contemplated defendant going back into custody unless he violated his mandatory supervision. Finding that defendant had "served out [his] days in full compliance with his mandatory supervision," and that it would be unfair to now require service of a prison sentence given the trial court's original sentencing error, the court

awarded defendant custody credit for the time he was placed on mandatory supervision as a result of the court's unauthorized sentence. The trial court's reliance on *Tanner* and *Holt* is misplaced.

In *Tanner*, the California Supreme Court determined the trial court had unlawfully granted the defendant probation and a one-year jail term rather than send him to prison. (*Tanner, supra*, 24 Cal.3d at pp. 518, 521-522.) The high court ruled, based on equity, that because the defendant had completed both the jail term and probation, and because sending him to prison for second incarceration would have been unjust, it would not require the defendant to serve the required prison term. (*Ibid.*) However, *Tanner* only applies when the judicial mistake resulting in the unauthorized sentence arises from an uncertainty in the law. (*Id.* at p. 521.) Here, there was no uncertainty in the law. (§ 18780; *Borynack, supra*, 238 Cal.App.4th at p. 964.)

The *Tanner* court's ruling was followed in *Holt* "wherein the defendant served one year in the county jail as a condition of probation erroneously granted in the face of a clear statutory prohibition. [Citation.] The court in *Holt, supra*, viewing further confinement as cruel and unusual punishment [citation], stated: 'It is one thing for the state to impose a mandatory prison term on a convict and require him or her to serve it. It is quite another thing to incarcerate a convict as a term of probation, allow the convict to successfully fulfill the condition of probation and return to the general population and then with no additional malfeasance on his or her part, remove him or her a second time from the general population to serve the relatively short balance of what should have

been the proper sentence. [Citation.]’ [Citation.]” (*People v. Enriquez* (1985) 173 Cal.App.3d 990, 997.) Here, defendant never served any time in custody.

In 2002, the California Supreme Court questioned whether *Tanner* remained good law, stating that “we have never relied on [*Tanner*] to pretermitt the correction of a sentence that was illegally or improperly imposed.” (*People v. Statum* (2002) 28 Cal.4th 682, 696 (*Statum*).) The Court explained that “[e]ven if *Tanner* remains good law,” it has been limited by the appellate courts to “to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) ‘unusual circumstances’ generate a ‘unique element’ of sympathy, such that returning the defendant to jail ‘would be more than usually painful or “unfair.”” [Citation.]” (*Id.* at pp. 696-697, fn. 5.) The Court held that even if *Tanner* remained good law, the defendant could not satisfy the equity test set forth in that case. (*Statum, supra*, at p. 697, fn. 5.)

This case presents the same circumstance present in *Statum*. Defendant was initially facing an exposure of over 60 years in prison. There is no ““unique element”” of sympathy such that it would be unusually unfair to require defendant to serve the legally required sentence. (*Statum, supra*, 28 Cal.4th at pp. 696-697, fn. 5.) Upon learning that the trial court’s initial grant of probation was unauthorized, defendant was given the opportunity to withdraw his plea. He declined. When discovering that the trial court’s second sentence of mandatory supervision was also unauthorized, he again declined the opportunity to withdraw his plea. Ultimately, defendant has never served the minimum

amount of time in custody that he is legally required to serve. Thus, he is not being asked to serve a second term for his criminal acts. (*Tanner, supra*, 24 Cal.3d at p. 521.)

For the above reasons, the trial court's order granting defendant custody credit for time spent on mandatory supervision must be reversed, and the matter must be remanded to allow defendant to withdraw his guilty plea. In the event he declines to withdraw his guilty plea, the trial court is to reinstate its judgment, except as to the award of conduct credits, which are to be recalculated. The defendant is to be resentenced to the legally required amount of time in custody with credit for time actually served.

### III. DISPOSITION

We reverse the trial court's order granting defendant custody credit for time spent on mandatory supervision. The matter is remanded to the trial court with instructions that defendant be given an opportunity to withdraw his guilty plea. In the event defendant declines to withdraw his guilty plea, the trial court is to reinstate its judgment except as to the award of conduct credits, which are to be recalculated in accordance with the views expressed in this opinion.

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HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

MILLER

J.